Supreme Court, U.S.
FILED
MAR 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 87-1288

In the Supreme Court of the United States

OCTOBER TERM, 1987

JOSE CRESPO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
WILLIAM F. WELD
Assistant Attorney General
JOHN F. DEPUE
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

11pp

QUESTIONS PRESENTED

1. Whether exigent circumstances justified petitioner's warrantless arrest in his apartment.

2. Whether petitioner's consent to the search of his apartment was voluntary.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Dorman v. *United States*, 435 F.2d 385 (D.C. Cir. 1970)	6
Payton v. *New York*, 445 U.S. 573 (1980)	4
United States v. *Acevedo*, 627 F.2d 68 (7th Cir.), cert. denied, 449 U.S. 1021 (1980)	5, 6
United States v. *Doe*, 787 F.2d 1290 (9th Cir. 1985)	5
United States v. *Mendenhall*, 446 U.S. 544 (1980)	6
United States v. *Milian-Rodriguez*, 759 F.2d 1558 (11th Cir.), cert. denied, 474 U.S. 845 (1985)	5, 6
United States v. *Standridge*, 810 F.2d 1034 (11th Cir. 1987)	5, 6
Welsh v. *Wisconsin*, 466 U.S. 740 (1984)	5

Statutes:

18 U.S.C. 1512(a)(3)	1-2
21 U.S.C. 841(a)(1)	1
21 U.S.C. 841(b)(1)(B)	1
21 U.S.C. 846	1

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1288

JOSE CRESPO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B1-B10) is reported at 834 F.2d 267.

JURISDICTION

The judgment of the court of appeals was entered on November 25, 1987. The petition for a writ of certiorari was filed on January 25, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of possession of cocaine with intent to distribute it (21 U.S.C. 841(a)(1) and (b)(1)(B)); conspiracy to commit that offense (21 U.S.C. 846); and two counts of intimidating and threatening an informant (18 U.S.C.

1512(a)(3)). He was sentenced to concurrent ten-year terms on each count, to be followed by a lifetime term of special parole.

1. In February 1986, petitioner and his brother arranged to sell government informant Maria Polkowski three kilograms of cocaine. The sale, however, did not take place. Later, petitioner and his brother learned that Polkowski was a government informant. In July and September of 1986, they threatened Polkowski and her children at gunpoint. At that time, Polkowski did not know petitioner's last name or where he lived. Pet. App. B2-B3.

Polkowski later learned that petitioner lived on the second floor of an apartment building in Queens, New York. She went with four agents of the Drug Enforcement Agency (DEA) to the building and, at their request, knocked on doors on the second floor in an effort to locate petitioner. When petitioner appeared at one of the doors, Polkowski asked him why he had threatened her. She also told petitioner that she wanted him to stop making threats. One of the agents, who was concealed around the corner of a hallway, then heard petitioner mention the word "killers" and tell Polkowski that "I have nothing to do with you, but my people will deal with you" (Pet. App. B3).

The agents, having observed petitioner commit a federal offense by threatening Polkowski (see 18 U.S.C. 1512(a)(3)), approached petitioner's apartment. Petitioner, however, retreated into his apartment and closed the door. The agents then knocked on the door and identified themselves. Peering through a peephole in the door, petitioner and his wife observed the DEA agents holding their guns. Petitioner then opened the apartment door. Pet. App. B4.

After the agents entered the apartment, one of the officers handcuffed petitioner, told him he was under arrest, and gave him *Miranda* warnings. Sometime later, the agents asked petitioner whether he had any guns in the apartment. Petitioner responded that he did not have any guns, and he then consented to a search of his apartment. On a closet shelf in the living room, the agents found a bag containing five and one-half pounds of cocaine, $1,800 in cash, numerous plastic bags, a triple-beam balance scale, and drug records. Pet. App. B4-B5.

2. Petitioner moved the district court to suppress the evidence obtained in the search of his apartment. He claimed that the agents' warrantless entry to make his arrest was unconstitutional. He further claimed that, in any event, his consent to the search of his apartment was not voluntary.

The district court denied petitioner's suppression motion. The court held that the agents' warrantless entry into the apartment to arrest petitioner was justified under the circumstances. The court reasoned that, as a result of petitioner's threats to Polkowski, the agents had the right immediately to arrest him; the agents were in pursuit of him when they entered his apartment. The district court also noted that petitioner's statements to Polkowski constituted a threat of "violence within the very near future" (Pet. App. A13). The court concluded that this circumstance also justified petitioner's immediate arrest (*id.* at A14-A16).

The district court further found that petitioner voluntarily consented to the search of his apartment. The court, noting petitioner's arrogant demeanor, found that it was likely that petitioner believed the agents would not discover the concealed narcotics. The court also found that petitioner knew that, by failing to consent to the

search, he would have only delayed the search, not prevented it. Pet. App. A13-A15, A19.

3. The court of appeals affirmed. Relying upon its decision in *United States* v. *Martinez-Gonzalez*, 686 F.2d 93 (1982), the court held that exigent circumstances permitted the agents' warrantless entry to arrest petitioner. In particular, the court stated that Polkowski and the agents would have been exposed to an unreasonable risk if petitioner had not been immediately arrested after he retreated into his apartment. The court noted that it was likely that petitioner was armed or would have quickly armed himself. Finally, the court found that there was a significant danger that petitioner would have attempted to escape if he had not been immediately arrested. Pet. App. B7-B9.

The court of appeals rejected petitioner's claim that his consent to the search of his apartment was not voluntary. The court held that the evidence supported the district court's finding that petitioner's consent was not simply a reaction to the agents' display of authority. Pet. App. B9-B10.

ARGUMENT

1. Petitioner renews his contention (Pet. 12-23) that the DEA agents' warrantless entry to effect his arrest was unconstitutional. In *Payton* v. *New York*, 445 U.S. 573 (1980), this Court held that a warrant is generally required to make an arrest in a suspect's home. The Court recognized, however, that exigent circumstances may justify warrantless arrests in dwellings. *Id.* at 583. The Court left to the lower courts the job of defining such exigent circumstances. In this case, the DEA agents' warrantless entry was based on two well-settled exigent circumstances.

First, law-enforcement officials may enter a suspect's home without a warrant to arrest the suspect if the suspect

is a threat to a specific person or to the public and immediate action is necessary to avert that threat. See, *e.g.*, *United States* v. *Doe*, 787 F.2d 1290, 1294 (9th Cir. 1985); *United States* v. *Milian-Rodriguez*, 759 F.2d 1558, 1564 (11th Cir.), cert. denied, 474 U.S. 845 (1985). Here, petitioner was a clear threat to Polkowski. In the agents' presence, petitioner told her that his "people" would "deal with" her, and he mentioned the word "killers." The agents knew that petitioner had previously threatened Polkowski with a gun. It was thus reasonable for the agents to be concerned that petitioner might carry out his threat or induce others to do so. The threat that petitioner posed to Polkowski and the gravity of the offense that he committed – intimidation of a federal informant – justified the agents' warrantless entry into his apartment for the purpose of making his immediate arrest. See generally *Welsh* v. *Wisconsin*, 466 U.S. 740, 752-753 (1984) (gravity of the offense is an important factor in determining whether an exigency exists).

Second, a warrantless arrest is also permitted when immediate action is needed to prevent the suspect from fleeing. See, *e.g.*, *United States* v. *Standridge*, 810 F.2d 1034, 1037 (11th Cir. 1987); *United States* v. *Acevedo*, 627 F.2d 68, 71 (7th Cir.), cert. denied, 449 U.S. 1021 (1980). In this case, as the DEA agents approached petitioner's doorway, he retreated inside and shut the door (Pet. App. B4). Petitioner was obviously then aware that he was being sought by the agents. And even though an agent had apparently been sent to the rear of petitioner's apartment building, it was likely that a single officer could not have prevented petitioner's escape (see *id.* at A19, B7). It would have been particularly difficult to prevent his escape if petitioner had been assisted by his brother and the two had been armed (see *id.* at B7). Accordingly, petitioner's immediate arrest

was justified to prevent his possible escape and to avoid the dangers associated with an escape attempt. See generally *United States* v. *Standridge*, 810 F.2d at 1037 (approving warrantless arrest to avoid an escape attempt likely to result in a gun battle); *United States* v. *Acevedo*, 627 F.2d at 71 (warrantless arrest proper where there was insufficient time to discover and secure all possible escape routes).[1]

2. Petitioner further contends (Pet. 23-27) that he did not voluntarily consent to the search of his apartment. It is plain that the agents' forced entry into the apartment and their arrest of petitioner do not compel the conclusion that petitioner's consent to the search was involuntary. See, *e.g.*, *United States* v. *Mendenhall*, 446 U.S. 544, 558-559 (1980) (defendant's detention did not vitiate consent to search luggage); *United States* v. *Milian-Rodriguez*, 759 F.2d at 1565 (entry and warrantless arrest based upon exigent circumstances did not taint voluntariness of consent

---

[1] In *United States* v. *Martinez-Gonzalez, supra*, the Second Circuit set forth an illustrative list of factors, originally announced in *Dorman* v. *United States*, 435 F.2d 385, 392-393 (D.C. Cir. 1970), for determining the existence of exigent circumstances. The factors include: (1) the gravity or violent nature of the offense; (2) whether the suspect is reasonably believed to be armed; (3) a clear showing of probable cause; (4) a strong reason to believe that the suspect is in the premises to be entered; (5) the likelihood that the suspect will escape if not swiftly apprehended; and (6) the peaceful circumstances of the entry. Although petitioner disputes whether the last two of the factors were present in this case (Pet. 20), the courts below concluded that there was a significant chance that petitioner would escape if he were not immediately apprehended (Pet. App. B7), and the district court found that the entry was peaceful (*id.* at A16-A17). In any event, as the court observed in *United States* v. *Martinez-Gonzalez, supra*, "the absence or presence of particular factors is not conclusive" (686 F.2d at 100). Here, the threat to Polkowski and the possibility of petitioner's escape justified the agents' warrantless entry.

to search). The district court found that petitioner was an arrogant and self-assured person who quite likely believed the agents would not discover the cache of narcotics concealed in his closet (Pet. App. A15). The court also found that petitioner, as a professional narcotics dealer, knew that he would gain nothing by failing to consent to the search, because his refusal would merely delay the search while the agents obtained a warrant (*id.* at 19). These findings amply support the lower courts' conclusion that petitioner's consent was voluntary. That fact-specific determination does not call for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General
WILLIAM F. WELD
Assistant Attorney General
JOHN F. DEPUE
Attorney

MARCH 1988

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60355